Decisions Applying the Kansas New Act

Board of Appeals Decisions

Prevailing Factor:

In ***Marquez v. Collectia Ltd.***, Docket No, 1,056,635 (October 2011), the claimant developed low back pain after lifting trash bins onto a flatbed truck without the assistance of a crane lift on May 17, 2011. The claimant had to push the bins onto a Tommy Lift by hand. Claimant told his employer a few days later that he was having back pain and going to see a doctor, but did not mention the work accident. Chiropractor notes indicated "reactivation" of low back pain, but no mention of work-related incident. The accident was eventually reported on June 14, 2011.

The parties disputed whether claimant proved work accident was the prevailing factor causing the injury. The court held that the claimant failed to carry his burden given the lack of mention of a work-related incident in the contemporaneous medical records from several providers.

***Note: The respondent could have potentially pursued a notice defense because the claimant sought medical treatment on his own, which shortens the notice period to 20 days from the date of accident. Claimant would have been out of time before June 14, 2011.

In ***Lowrey v. USD 529***, Docket No. 1,056,645 (November 2011), the claimant was working on the third rung of ladder in the boiler room when he missed a step going down and fell to the floor. He hit his left knee, right shoulder and back of his right arm. Although his other complaints resolved, he continued to have complaints related to his knee. An MRI revealed a meniscal tear as well as significant degeneration of the joint, with degenerative changes clearly preexisting. The respondent argued that there was no "accident" and that the accident was not the prevailing factor causing the medical condition.

The Board held that medical evidence is not necessary to prove an accident or to prove that the accident caused an injury. The claimant's testimony can be sufficient. But, before the injured employee is eligible for treatment, that employee must prove that the accident was the prevailing factor causing the injury. The medical evidence suggested the mensical tear was separate from the degeneration and that the mechanical symptoms the claimant was having were the result of the meniscal tear. However, the doctor's opinion did not address whether the meniscal tear was the result of the alleged work accident. Accordingly, the Board reversed the ALJ's order and found there was an accident and injury, but did not find that the claimant met his burden of proving the accident was the prevailing factor causing the injury.

In ***Strome v. US Stone Industries***, Docket Nos 1,058,202 & 1,058,204, (February 2012), the claimant alleged injury to his back. As the claimant was walking to the office, he was startled by the sound of tires on gravel and jerked and twisted his back. The claimant reported a stabbing pain in the middle of his low back. Claimant alleged a second accident approximately two weeks later when he lost his footing on a concrete deck, stepped backwards approximately one foot, and felt a cracking

sensation and pain in his back and neck. Claimant underwent two MRIs which both showed degenerative changes. Dr. Henry opined that claimant's twisting motion could have exacerbated his underlying condition, but it was not the prevailing cause.

The Board found that the evidence established that claimant had no problems with his back prior to the alleged accident; that claimant probably had degenerative disk disease in his low back which preexisted the alleged accidents; that claimant's preexisting disease was likely made symptomatic, aggravated, triggered, or precipitated by the accident; and that the degenerative disease probably developed as a result of the natural aging process. Additionally, the only medical opinion to address the prevailing factor issue concluded that the alleged accidents were not the prevailing cause.

Accordingly, the Board held that claimant's evidence that he was asymptomatic before the first alleged accident and became symptomatic thereafter is relevant to the issue raised by claimant, but is insufficient to sustain claimant's burden of proof in light of the amended Act and unrefuted opinion of Dr. Henry.

Prevailing Factor – multiple employments

In ***Mazouch v. U.S.D. 428*** and ***Mazouch v. Wal-Mart***, Docket Nos 1058571 and 1058572 (April 2012), the claimant alleged injury by repetitive trauma against two separate employers. Claimant had worked part-time for U.S.D. 428 in food service since 1998. In July 2010 Claimant began a second part-time job at Wal-Mart. At Wal-Mart claimant spent two months in the deli department and then moved to cashier. In July 2011 she transferred to the floor where she folded clothes and picked up after customers. At some point the claimant began experiencing numbness in her hands, which eventually radiated up to her harm and caused tightness and pain in her shoulders and neck. Claimant was diagnosed with severe carpal tunnel syndrome on October 12, 2011. She first reported her problems to her supervisor at U.S.D. 428 and was told she also needed to file a workers compensation claim against Wal-Mart, which she did that same day. Dr. Brown evaluated the claimant and opined that work claimant performed for U.S.D. 428 and Wal-Mart exposed the claimant to an increased risk and the increased risk was the prevailing factor in causing her medical conditions and resulting disability. He further found that the work at U.S.D. 428 was the prevailing factor in 75 percent and work for Wal-Mart was the prevailing factor in 25 percent of the medical conditions and resulting disability or impairment.

The ALJ found that claimant's work at U.S.D. 428 was the prevailing factor in development of her bilateral upper extremity complaints and ordered U.S.D. 428 to pay benefits. The Board noted the prevailing factor statute cannot be interpreted to mean that a larger contribution by one employment requires that another employment must be found not to be a prevailing factor. Under K.S.A. 44-503a, whenever an employee is engaged in multiple employment and sustains an injury which arose out of and in the course of the multiple employment with all such employers and which did not clearly arise out of and in the course of employment with any particular employer, the employers are liable to pay a proportionate amount of the compensation payable under the workers' compensation act. The Board discussed the intent of the legislature to

include injury by repetitive trauma in this statute. For a repetitive trauma to arise out of multiple employments, more than one employment must be the prevailing factor in causing the injury. Thus, the legislative intent must have been to take multiple employers in the aggregate when multiple employments contributed to an injury. Accordingly, as both work at U.S.D. 428 and Wal-Mart contributed the claimant's bilateral upper extremity injuries, both employers were liable for a portion of claimant's benefits.

Date of Accident - Repetitive Trauma:

In ***Burnom v. Cessna Aircraft Co.***, Docket No. 1,056,443 (November 2011), the claimant alleged a series of repetitive injuries to her knees through her last day worked, which was April 25, 2011. The respondent was not notified of any claim until receiving the Notice of Intent, which was filed June 21, 2011. Under the old Act the claimant's date of accident would be June 21, 2011. Under the new Act, the claimant's date of accident would be April 25, 2011. Therefore, if new Act were applied, the claimant's claim would be time barred and compensation would be denied. If the old Act were applied, notice would be timely.

The Board held, the new Act does not apply because it would require an impermissible retroactive deprivation of substantive and vested rights. Applying the old Act provision regarding date of accident, the Judge fixed the date of accident as June 21, 2011.

In ***Whisenand v. Standard Motor Products, Inc.***, Docket No. 1,056,966 (January 2012), the claimant alleged injury to left shoulder and low back from constantly reaching, pulling, bending, twisting, and lifting to unload or break down skids. Claimant's last day worked was April 21, 2011. Although the date the claimant provided notice to her employer was disputed, the Court determined the claimant did not give notice until July 11, 2011. Application of the new Act would result in a date of accident of April 21, 2011 and the claimant's claim would be time barred. Under the old Act, the claimant's date of accident would be July 14, 2011, the date the authorized treating physician provided work restrictions.

In this case, the Board applied the old Act as the claimant last worked for respondent on April 21, 2011. Therefore, the Board found claimant timely reported her injury.

Notice

In ***Ferguson v. Resers Fine Foods, Inc.*****,** Docket No. 1,057,620 (March 2012), the claimant alleged an injury when he tripped and fell at work. Claimant told two floor supervisors about the accident the day it happened, but he never told his actual supervisor about the incident as required by respondent's reporting procedure. Claimant later met with a member of the human resources department and was again told he needed to tell his supervisor about the accident and filled out a written document indicating he had discussed reporting procedure for an alleged accident. Following a preliminary hearing, the ALJ denied benefits because the claimant did not provide notice to his supervisor as required by respondent's accident reporting procedure.

The Board reversed the ALJ's decision and awarded benefits. The Board noted that under the new statute, "where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section." K.S.A. 44-520(a)(2). The Board found that the respondent's policy only required the claimant notify an individual with the title of supervisor, which claimant did on the day of accident.

Additionally, the Board noted that notice may also be provided in writing and further found that the written document signed and delivered to respondent's human resources constituted timely written notice of the alleged accidental injury.

***Note: Employers may designate an individual or department to receive notice, rendering notice to anyone else insufficient. However, this designation must be communicated in writing to the employee AND is only effective with regards to oral notice. Notice in writing must be sent to a "supervisor or manager at the employee's principal location of employment," regardless of any other designation by the employer.

In ***Huerter v. Orval Jueneman Dozer Services, Inc.***, Docket No. 1,058,888 (April 2012), the claimant alleged he was hit in the right eye with a saw while helping his supervisor move a concrete saw. Claimant testified he was hit hard enough that he saw stars and was nearly knocked out. Claimant staggered back and sat in a chair holding his eye. He did not say anything to anyone at his employer about the accident or injuring his eye, but thought his supervisor and a nearby co-worker witnessed the accident. When claimant got home that evening he had a black eye. When he returned to work the next day, no one said anything about the black eye nor did claimant report the injury to anyone. Over one month later, claimant began developing vision problems and had emergency surgery for a retinal tear. Claimant reported his injury immediately after being diagnosed with the retinal tear. Both claimant's supervisor and another employee claimant alleged witnessed the injury testified they were unaware of any accident and never saw claimant with a black eye.

The ALJ denied benefits because the claimant failed to provide notice of his accident within 30 days. Claimant appealed arguing that he was physically unable to give notice because he was unaware of the retinal tears until over 30 days after his accident. The Board noted that under prior law, these circumstances could be considered as just cause to enlarge the time for giving notice but the legislature removed that portion of the statute. Therefore, the fact that claimant was unaware of the severity of his injury is irrelevant under the current statute for purposes of extending the time for giving notice. Additionally, the Board noted that whether or not claimant knew the severity of his injury, he did know of his accident and that was injured in some degree, at least to the extent of having a black eye. Moreover, the Board found that the employer did not have actual knowledge of the injury based on the testimony of claimant's supervisor and co-worker. Accordingly, the Board denied benefits based on claimant's failure to give timely notice.

Safety Defense

In ***Goodson v. Goodyear Tire & Rubber Company,*** Docket No. 1,057,615 (January 2012), the claimant alleged injury by repetitive trauma from lifting and carrying liners on shells weighing from 30 to 100 pounds. Respondent asserted a safety defense under K.S.A. 44-501(a)(1)(D) for reckless violation of its workplace safety rules or regulations because the claimant lifted double liners, which was a violation of what respondent contended was a safety rule.

The Board held that there was insufficient evidence to show that claimant was aware of the alleged safety rule prior to his date of accident. No witnesses testified they told the claimant about the safety rule. Two small notices were posted in the claimant's work area, but claimant denied seeing them prior to his injury. Furthermore, the Board stated that the notices posted did not constitute a safety rule, but rather a request not to lift double liners unassisted.

In ***Solorzano v. Packers Sanitation Services, Inc.***, Docket No. 1,056,986 (January 2012), the claimant was part of a team that cleaned the Tyson plant. Claimant suffered a fractured forearm after her glove got caught on a conveyor and crushed her arm between a roller and a belt. Respondent asserted a safety defense for failing to follow the lock out tag out safety policy.

Claimant attended several training sessions on lock out procedures, including one session specifically on the machine she was cleaning when she was injured. Claimant had followed the lock out tag out procedure when cleaning the belts and conveyors. After she finished, she realized she missed a spot underneath the conveyors. She did not lock out the machine before cleaning this spot. Claimant acknowledged that she had been trained to lock out a machine before cleaning it and that she had done so before cleaning the belts. Nevertheless, she did not think that safety rule applied to cleaning the area beneath the conveyor where she was cleaning when her injury occurred. Her testimony was contradicted by her admission that the respondent's policy was to lock out a machine when working within six feet of the machine.

The Board held that a claimant must be aware of and understand a safety rule before she can be said to have recklessly violated the rule. The Board stated it did not appear from the record that claimant understood the policy of locking out any machine within six feet applied to the work she was doing when the accident occurred.

Future Medical Treatment

In ***Vega v. Lowe's Home Centers, Inc.***, Docket No. 1,048,416 (May 2012), the claimant was awarded permanent disability benefits for an injury on August 15, 2009. The ALJ did not award claimant future medical benefits, relying on the amended version of K.S.A. 44-510h, which became effective on May 15, 2011. The Board affirmed the award of permanent disability benefits, but found K.S.A. 44-510h, as amended effective May 15, 2011, was not applicable to this claim because that provision was not effect when claimant sustainer her accidental injuries and it may not be retroactively applied to

this claim. The amended version of K.S.A. 44-510h affects the substantive rights of the parties and there is nothing in the language of the new act which suggests that the legislature intended for the section to apply retroactively. Accordingly, the Board held that claimant's right to future medical treatment remained open upon application to and approval by the Director.

ALJ Level Decisions Applying KS New Act

Notice

Walker v. General Motors
Decision by J. Hursh
Handled by MVP attorney Fred Greenbaum

Claimant suffered injury to his low back due to his repetitive work duties. He saw a physician on his own in September or October of 2011, at which time both the claimant and the physician believed the repetitive bending on the job was causing his symptoms. The claimant did not report a work injury to his employer until January 3, 2012.

ALJ Hursh denied all benefits finding:

- Under K.S.A. 44-520 a claimant who is still working for the employer who seeks medical treatment for an injury must proved notice within 20 days of receiving such treatment. Claimant's report of injury on January 3, 2012 was well beyond 20 days from the date he sought medical treatment.

Way v. Dee Jay's QSR Inc.
Decision by ALJ Avery
Handled by MVP attorney Kendra Oakes on behalf of Eric Lanham

Claimant alleged traumatic injury to his shoulder on August 1, 2011 and testified that he told his shift manager and wrote out a statement on a plain sheet of paper to leave for the store manager, who was a friend of his. Store manager, shift manager and co-worker all testified that no one had any knowledge Claimant had sustained an injury to his shoulder on August 1, but the claimant had always complained about a "bone spur" in his shoulder over the course of his employment with the Respondent.

ALJ Avery denied all benefits finding:

- Claimant's manager testified that the first time he had notice of an alleged accidental injury was in September 2011 when an attorney contacted him about the claimant receiving treatment for his alleged injury. This was more than 30 days after his alleged accident. The ALJ found claimant's testimony to lack credibility and denied benefits.

Prevailing Factor

Need for medical evidence on issue of prevailing factor

Way v. Dee Jay's QSR Inc.
Decision by ALJ Avery (same case as above)
Handled by MVP attorney Kendra Oakes on behalf of Eric Lanham

ALJ Avery denied all benefits finding:

- Claimant had complained of shoulder pain every 2-3 weeks before the alleged accident and there was no medical evidence addressing the issue of whether the alleged accident was the prevailing factor in causing his medical condition.

Neutral Risk

Ayala v. Unified Government of Wyandotte County
Decision by ALJ Hursh
Handled by MVP attorney Kendra Oakes on behalf of David Menghini

Claimant was injured when she was leaving the building of her employer to take a paid break. The building had an elevator, but she elected to use the stairs. Claimant's memory of what happened was not clear, but she thought that one of her strides hit short and when she tried to correct her balance she either missed or just brushed the top stair causing her to fall down the stairs. She did not trip on anything on the floor and there were no defects with the stairs.

ALJ Hursh denied all benefits finding:

- Claimant was not required to go up and down stairs to perform her work or to take work breaks – she could either take the stairs or the elevator. There was nothing peculiar to the condition of the stairs that caused the accident. The facts fit the KSA 44-508(f)(3)(A)(ii) exception to "arising out of and in the course of employment,"

Graves v. Professional Service Industries
Decision by ALJ Sanders
Handled by MVP attorney Karl Wenger

Claimant felt a pop in her knee with sharp shooting pains as she put her weight down on her foot as she stepped out of her work truck. Claimant gets in and out of her work truck thirty times a day. She did not recall twisting her knee or falling to the ground.

ALJ Sanders denied all benefits finding:

- Claimant injured her knee while exiting a vehicle that was not excessively high off the ground and stepping onto a surface that was neither uneven or slippery. These circumstances constituted a risk that is not particular to her job. While

getting in and out of her truck was inherent to her job, it did not put Claimant at risk.

Aggravation/Acceleration/Exacerbation of Preexisting Condition

McIntosh v. Goodyear Tire & Rubber Co
Decision by ALJ Sanders
Handled by MVP attorney Fred Greenbaum

Claimant was a forklift operator who had to drive his forklift over a ramp multiple times a day which resulted in a significant jolt where Claimant was bounced up and down in the seat of the forklift each time. On one occasion when Claimant was bounced, he felt significant pain going from his low back into his right side. Claimant had problems with his low back dating back to 2006. He had two MRIs. The first in 2009 showed a mild broad based disk bulge and suspected annular tear within the bulge at L3-4 and left paracentral mild protrusion at L4-5. The second MRI was in August 2011 and showed an acute herniated disk at L5-S1 and stenosis of the lateral recesses on the left at L4-5.

ALJ Sanders denied all benefits finding:

- Claimant had preexisting condition in his lumbar spine prior to this alleged accident which had required medical treatment. Although there were more severe symptoms following the alleged accidental injury and the symptoms were on his right side rather than his left, as before, the prevailing factor in Claimant's need for treatment was an aggravation and exacerbation of the preexisting condition.

Gitchel v. Philips County Retirement
Decision by ALJ Moore
Handled by MVP attorney James Wolf

Claimant was a CNA in a nursing home. She alleged an injury to her back when she twisted while reaching for a wheelchair. Claimant had a prior injury to her low back in 2009 while working for the Respondent. At some point she left Respondent's employ and went to work as a cashier at a convenience store. She returned to Respondent's employ on August 18, 2011. At her interview she told Respondent that her back was not giving her any significant problems. However, she sought medical treatment for low back pain that same day after leaving her interview. The records from that date indicate that her back had gotten progressively worse in the preceding couple of weeks. Six days before her alleged accident Claimant sought treatment for chronic low back pain with her primary care doctor with some pain radiating down her right leg and no relief from Lortab or Gabapentin. The morning of the alleged accident Claimant was complaining of chronic and severe low back pain as she began her shift and appeared to be walking stiffly early in the shift. Reports were obtained from Dr. Reiff Brown on behalf of the Claimant and by Dr. John Estivo on behalf of the Respondent. The doctors' opinions regarding the issue of prevailing factor opposed each other.

ALJ Moore denied all benefits finding:

- Claimant merely aggravated, accelerated or exacerbated her pre-existing condition and thus, Claimant failed to sustain her burden or proving that her accident was the prevailing factor in causing her injury, medical condition or resulting disability or impairment. Dr. Estivo's opinion was more persuasive as Dr. Brown's opinion offered a conclusion without convincing analysis while Dr. Estivo's opinion was based on Claimant's pre and post accident diagnosis and treatment recommendations.

Tindell v. Associated Wholesale Grocers
Decision by ALJ Hursh
Handled by MVP attorney Fred Greenbaum

Claimant alleged injury to his left shoulder arising out of and in the course of his employment. Claimant worked for the employer for 31 years as a driver/loader in a warehouse. Although he admitted to various aches and pains over the years from doing his work, including pain in his left shoulder, he did not note any special problems prior to February 1, 2012. On that day, Claimant felt a pop and sharp pain in his left shoulder while moving some product by hand. He finished his shift, but had continued pain and reported his injury first thing the next day.

Dr. Lingenfelter noted an MRI showed a massive two tendon rotator cuff tear, but also showed grade II fatty degeneration in the tear, which beyond a doubt meant the tear did not occur as recently as February 1, 2012. Dr. Lingenfelter said it was possible the tears were caused by overload from repetitive loading and lifting and remained unsymptomatic until the February 1, 2012 "flare up."

Claimant obtained the opinion of Dr. Hopkins who opined that the claimant's 31 years of heavy repetitive work duties culminating with the specific injury of February 1, 2012 are the prevailing factor causing the left shoulder condition and need for treatment.

ALJ Hursh denied all benefits finding:

- The February 1, 2012 trauma started the symptoms in claimant's left shoulder. The MRI results showed the physical damage to Claimant's shoulder was clearly pre-existing. Therefore, the February 1, 2012 traumatic injury was an aggravation of a pre-existing condition and as such was not an injury arising out of and in the course of employment.
- There was also insufficient evidence to find Claimant suffered injury by repetitive trauma arising out of and the course of his employment. Dr. Hopkins' statement that at least half of the males over age 50 have similar changes tended to show this was an injury resulting from natural aging.

Drug Defense

Starr v. Garsite Progress LLC
Decision by ALJ Yates
Handled by MVP attorney Fred Greenbaum

Claimant was a welder who allegedly sustained a crush injury to his finger while operating a plate press. Claimant reported to the hospital the day of the alleged injury for emergency treatment and the following day was sent to an occupational health clinic for a mandatory post-accident drug test. The results of the drug test revealed a level of 50 mg/ml of marijuana. Claimant testified that he had smoked marijuana on his birthday ten days prior to the date of accident and had not used any drugs in the ten days between. He also testified that he only took a few puffs while a joint was being passed between two or three other individuals.

ALJ Yates denied all benefits finding:

- In accordance with KSA 44-501(b) it is conclusively presumed that the Claimant was impaired by drugs at the time of the injury and Claimant failed to rebut the presumption by clear and convincing evidence as required by statute.